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No. 89-5916

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a state prisoner who serves as a witness in federal court proceedings is entitled to a witness fee under 28 U.S.C. 1821.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1b-14b) is reported at 884 F.2d 1343.1/

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A petition for rehearing was denied on October 23, 1989. The petition for a writ of certiorari was filed on October 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ In the appendix to the petition, the dissent in the court of appeals is separately numbered. For convenience, we will cite the dissent as "Pet. App. 8b-14b."

STATEMENT

Petitioner is a prisoner at the Arkansas Valley Correctional Facility of the Colorado Department of Corrections in Crowley, Colorado. After testifying in a federal criminal trial in the United States District Court for the District of Colorado, he unsuccessfully petitioned the clerk of that court for assistance in obtaining payment of witness fees. On petition for review of that decision, the district court denied relief. Pet. App. 1a-2a. The court of appeals affirmed. Pet. App. 1b-14b.

1. On March 3, 1988, petitioner was transferred by federal marshals pursuant to a writ of habeas corpus ad testificandum from the Arkansas Valley Correctional Facility to the Denver County Jail where he was held in readiness to testify in United States v. Ronald Brooks Tippett, No. 87-CR-386 (D. Colo.). The trial began on March 7, 1988 and ended on March 18, 1988. Petitioner testified on March 15, 1988. He was held in the Denver County Jail until April 5, 1988, when he was returned to the Arkansas Valley Correctional Facility. Pet. Complaint 2.

Petitioner requested that the district court clerk prepare a certification pursuant to 28 U.S.C. 1825(a)(2) and forward it to the United States Marshal for the District of Colorado for payment of witness fees pursuant to 28 U.S.C. 182_(a)(1) and (b). Pet. 3-4. When no certification was prepared, petitioner sought relief in the district court by filing a "Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in

the Nature of Mandamus." Pet. Complaint 1-7.

The district court denied the petition and dismissed the alternative complaint. Pet. App. 1a-2a. Relying on United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982); and Meadows v. United States Marshal, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971), the court held that "[i]nmate witnesses are not entitled to receive witness fees." Pet. App. 1a.

2. With one judge dissenting, the court of appeals affirmed. Petitioner had argued that the plain language of 28 U.S.C. 1821(a)(1) and (b) mandated the payment of witness fees for attendance to all witnesses, whether incarcerated or not, and that the absence of qualifying language related to prisoners, such as that included in Section 1821(d)(1) for subsistence fees, showed that Congress did not intend to preclude prisoners from receiving attendance fees. The court conceded that the argument was "appealing." Pet. App. 4b.[2/] It noted, however, that the

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2/ In pertinent part, 28 U.S.C. 1821 provides:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * * * *
>
> (b) A witness shall be paid an attendance fee of $30

(continued...)

qualifying language in subsection (d)(1) could plausibly be interpreted to coordinate with the special provision for material witnesses in subsection d(4)[3/], rather than to imply that prisoners are to receive attendance fees. Pet. App. 4b.

The court further found "strong evidence" that Congress never intended Section 1821 to apply to convicted prisoners. Ibid. The court pointed out that since 1900, the Treasury Department has taken the position that convicted prisoners are not entitled to witness fees; that in 1970 and 1972 two different

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2/ (...continued)
per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

* * * * *

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

* * * * *

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

Former Section 3149 of title 18, now 18 U.S.C. 3144, is the federal material witness statute.

3/ That is, to make clear that material witnesses who are detained because of inability to post a security bond--the witnesses referred to in subsection (d)(4)--are to receive only the subsistence allowance provided for in subsection (d)(4).

federal appellate courts held to the same effect;[4/] that in its 1978 revision of the witness fee statute Congress showed no intention and took no steps to change these existing judicial and administrative interpretations of the statute; that two additional courts of appeals have since rejected petitioner's interpretation of the statute;[5/] and that Department of Justice regulations published in 1986 (28 C.F.R. 21.4(d)) declare that witnesses who are convicted prisoners are not eligible to receive witness fees. Pet. App. 4b-6b.

The court identified two other factors supporting the view that convicted prisoners are ineligible to receive witness fees. First, the legislative history of the 1978 revision of Section 1821 showed a Congressional intent that witness fees "compensate the average witness for the actual costs which witness service entails." H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978). Other than the loss of "the very modest compensation they might receive from participating in prison job programs," the court reasoned, convicted prisoners did not incur financial costs from witness service.[6/] Second, the court foresaw a potential for abuse in circumstances that would encourage prisoners to file

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4/ The decisions in question were Marchese v. United States, 453 F.2d 1268, 1271 (Ct. Cl. 1972), and Meadows v. United States Marshal, supra.

5/ United States v. Garmany, supra; In re Grand Jury Matter (Witness RW), supra.

6/ Petitioner earns $40 a month working as a clerk at the Arkansas Valley Correctional Facility. See Pet. Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis 1.

suit and subpoena inmate friends as witnesses in order to provide them both with trips outside the prison and a $30 daily witness fee far exceeding the compensation available in prison job programs. Pet. App. 6b-7b.

Judge Ebel dissented. Although he did not quarrel with the policy concerns expressed by the majority, he found that the language of 28 U.S.C. 1821 was "clear and unambiguous," and that although Congress evidently knew how to create an exclusion in the statute, it had not done so for convicted prisoners. Pet. App. 8b-10b. He disputed the majority's analysis of subsections (d)(1) and (4), arguing that the decisions relied on by the majority had not analyzed the plain language of the statute, that Congressional acquiescence in those decisions should not be read into Congress's failure to revise an already clear Section 1821, and that it was the responsibility of Congress, not the courts, to address the policy concerns noted by the majority. Pet. App. 10b-14b.

ARGUMENT

Petitioner contends (Pet. 5-15) that a convicted state prisoner who serves as a witness in federal court proceedings is entitled to the payment of witness fees pursuant to 28 U.S.C. 1821(a)(1) and (b). The contention is without merit. The decision of the court of appeals was correct, and is supported by the clear Congressional purpose behind the fees, the relevant case law, and long-standing administrative practice.

1. In pertinent part, 28 U.S.C. 1821(a)(1) and (b) state that "a witness in attendance at any court of the United States * * * shall be paid the fees and allowances provided by this section," including "an attendance fee of $30 per day for each day's attendance." As the Senate Committee on the Judiciary explained when fees and allowances for witnesses were increased in 1949, the purpose of providing for such fees and allowances was to provide fair compensation for "time and expenses incident to * * * service as a witness." See S. Rep. No. 187, 81st Cong., 1st Sess. 1 (1949). The House Judiciary Committee made a similar comment on a predecessor statute, c. 183, Sections 1-3, 44 Stat. 323-324, in H.R. Rep. No. 308, 69th Cong., 1st Sess. 2-3 (1926): "This bill does not provide compensation nor give a bounty for jury service or service as witnesses, but merely provides fees that will approximately take care of necessary expenses." In 1978 Congress reiterated that the consistent purpose of this statute has been to "compensate the average witness for * * * actual costs." H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978).

As a convicted state prisoner, petitioner is not an average witness, since his time is not at his disposal, and he does not cover his own living expenses. Petitioner, a state prisoner who was temporarily in federal custody pursuant to a writ of habeas corpus ad testificandum incurred no expenses for transportation or subsistence. Although he may have missed an opportunity to earn part of his $40 monthly compensation in his prison job,

Congress could not have intended to permit petitioner, in such circumstances, to obtain a windfall of $30 per day. Moreover, as the court of appeals correctly noted, the availability of such a windfall to convicted prisoners would invite large-scale abuse of the witness fee system.

2. The decision of the court below is likewise supported by every reported decision in which a court has considered the issue raised by petitioner. See United States v. Garmany, supra; In re Grand Jury Matter (Witness RW), supra; Marchese v. United States, supra; Meadows v. United States Marshal, supra. In Meadows, for example, the court held that Section 1821 does not authorize payment of witness fees to federal prisoners in the custody of the Attorney General since "they are not in a position similar to ordinary witnesses who must incur private costs in order to testify" (434 F.2d at 1008). That analysis is equally applicable here, and petitioner's argument must therefore be rejected.

3. The conclusion of the court of appeals is also consistent with long-established administrative practice. In an early opinion, the Comptroller of the Treasury held that a convicted federal prisoner was not entitled to witness fees or allowances because his "time and services belonged to the Government, which is charged with his care and support." In addition, a prisoner was not entitled to mileage, since "[t]he Government necessarily bears the expenses of his transportation." The Comptroller did rule that a fee must be paid

to a prisoner who is merely awaiting trial since "his time has not been forfeited to the Government." 6 Comp. Dec. 588 (1900).

The Comptroller General thereafter rejected demands for compensation from state prisoners, similar to petitioner's claim here, on the principle that the statutory provision for fees to witnesses "is not intended to compensate them for testifying, but simply to pay their expenses while away from home" (18 Comp. Gen. 609, 610 (1939)), and that witnesses who are in custody, whether federal or state, are "not subjected to any expense by reason of their attendance." 18 Comp. Gen. 765, 766 (1939). And, as the court of appeals noted, the Justice Department as recently as 1986 reiterated its understanding that "[a] witness in custody for purposes other than [the material witness statute] is ineligible to receive the attendance and subsistence fees provided by this section" (28 C.F.R. 21.4(d)).7/

4. The case upon which petitioner primarily relies, Hurtado v. United States, 410 U.S. 578 (1973), does not require a different result. The witnesses in that case were incarcerated

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7/ The short answer to the extensive statutory arguments made by petitioner and the court below is that for 90 years no court or administrative agency that has considered the witness fee statute has interpreted it to provide fees for convicted prisoners, and for the same 90 years, during multiple revisions of the statute, Congress has never seen fit to disagree with this uniform judicial and administrative interpretation. As the court below observed in FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986), "[w]hen the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'" (quoting NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974)).

only because they were witnesses.[8/] Underlying the holding in Hurtado was the Court's perception that a person detained as a material witness "is in the same position as a non-incarcerated witness." 410 U.S. at 587. A material witness-detainee is prevented from conducting his affairs as an ordinary citizen solely because he cannot afford bail to secure his attendance as a witness; were it not for his status as a witness, he would not be incarcerated. Petitioner's incarceration, however, stems from another cause entirely: he has been convicted of a crime. Thus he is not "in the same position as a non-incarcerated witness." See Marchese v. United States, 453 F.2d at 1271; Meadows v. United States Marshal, 434 F.2d at 1008; In re Witness Fees for Prisoner, 533 F. Supp. 401, 402-403 & n.5 (E.D. Pa.), aff'd, 697 F.2d 103 (3d Cir. 1982).

Furthermore, as the court noted in In re Witness Fees for Prisoner, 533 F. Supp. at 403 & n.6, Congress read Hurtado as requiring witness fees for material witnesses detained pursuant to a statute, not for any other category of detainee-witnesses. See H.R. Rep. No. 1651, 95th Cong., 2d Sess. 5 (1978); accord, S. Rep. No. 756, 95th Cong., 2d Sess. 3-4 (1978). Congress therefore increased the witness fee, and excluded illegal aliens from receiving any fees, in order to "provide more reasonable compensation for the inconvenience and financial hardships which detention entails." Ibid. Accordingly, because service as a

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8/ They were detained as material witnesses under former Fed. R. Crim. P. 46(b), which was superseded by 18 U.S.C. 3149, now 18 U.S.C. 3144.

witness by a convicted prisoner does not entail such inconvenience or hardship, it is clear that Congress did not intend that witness fees be paid to convicted prisoners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on March 29, 1990.

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March 29, 1990

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